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UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

DIVISION OF JUDGES

SAN FRANCISCO BRANCH OFFICE

David Saxe Productions & V Theater Group, Employer/Respondent, and International Alliance of Theatrical Stage Employees and Moving Picture Technicians, Artists and Allied Crafts of the United States and Canada, Local 720, Charging Party/Petitioner.	No. 28-CA-219225, 28-RC-219130, et al. **UNION'S POST-HEARING BRIEF IN SUPPORT OF OBJECTIONS TO ELECTION, UNION'S POSITION ON CHALLENGED BALLOTS AND IN SUPPORT OF UNFAIR LABOR PRACTICE CHARGES**

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I. INTRODUCTION

International Alliance of Theatrical Stage Employees and Moving Picture Technicians, Artists and Allied Crafts of the United States and Canada, Local 720 ("Union") hereby submits this Post-Hearing Brief concerning the post-election Objections filed by the Union in case 28-RC-219130, 28-CA-219225, et al., over conduct by the employer, David Saxe Productions & V Theater Group ("Employer") during the critical period, as well as in support of the consolidated Complaint regarding unfair labor practice charges.

The Board conducted an election on May 17, 2018. As discussed below and set forth in the record, the Employer, by and through its agents, engaged in conduct that objectively interfered with the employees' exercise of free choice.

The evidence in the record demonstrates the Employer's acts tended to interfere with the employees' freedom of choice. Accordingly, the Administrative Law Judge ("ALJ") should uphold the Union's Objections, set aside the election, and direct a new election. In the alternative, should the ALJ determine the Employer committed unfair labor practice charges in the consolidated matter pursued by the General Counsel resulting in at least the reinstatement of a majority of the seven discriminatees who voted subject to challenge, then the Union requests the order with respect to its Objections be that the challenged ballots cast in the May 17, 2018 election by the reinstated discriminatees who voted subject to challenge be opened—rather than conduct a new election.

The Union herein sets forth its closing argument with respect to the Objections and the challenged ballots, followed by its closing argument with respect to the companion unfair labor practices alleged in the consolidated Complaint, particularly regarding the remedies sought.

II. CHARGING PARTY'S OBJECTIONS

A. PROCEDURAL HISTORY

The Union filed the petition for an election in this matter on April 26, 2018. The Board conducted an election on May 17, 2018 pursuant to a Stipulated Election Agreement.

Pursuant to the Stipulated Election Agreement, employees eligible to vote on May 17 included:

> All full-time and regular part-time Stagehands, Lighting Technicians, Audio Technicians, Spotlight Operators, and Wardrobe Technicians employed by the Employers at the Saxe Theater and V Theater facilities in Las Vegas, Nevada.

The final Tally of Ballots shows that out of approximately 56 eligible voters, and 48 votes cast in total, 19 votes were cast in favor of union representation and 22 against representation, with seven (7) challenged ballots. The names of the seven challenged voters are as follows:

1. Taylor Benavente Bohannon
2. Kevin Michaels
3. Zachary Graham
4. Nathaniel Franco
5. Alanzi Langstaff
6. Leigh-Ann Hill
7. Jasmine Glick

The Union then timely filed fourteen objections, scheduled for hearing by the Regional Director.

The fourteen Objections set for hearing are as follows:

1. The Employer discharged pro-union employees. [1]
2. The Employer provided an inadequate voter eligibility list.
3. The Employer provided wage increases during the critical period.
4. The Employer intimidated voters and engaged in surveillance including through the Employer's agent, Courtney Kostew, whose agency existed due to her (a) serious relationship

[1] Objections 1, 3, 13 and 14 are directly covered by the Complaint issued against the Employer in consolidated NLRB Cases 28-CA-219225, 28-CA-223339, 28-CA-223362, 28-CA-223376, and 28-CA-224119. Objections 5, 7, 8, 11 and 12 are partially covered by the Complaint. The Union separately joins the General Counsel's post-hearing brief as described, *infra*.

with Stage Manager Thomas Estrada, (b) designation by the Employer as its election observer, and (c) promotion to cue caller and/or assistant stage manager.[2]

5. The Employer interfered with the laboratory conditions of the election by failing to post the NLRB's required notice of petition in all applicable break rooms and conspicuous places visible to eligible voters.

6. The Employer interfered with laboratory conditions by surrounding the Notice of Elections with "vote no" signs and other anti-union propaganda.

7. The Employer interfered with laboratory conditions by failing to distribute the Notice of Election to employee's regularly-used company email addresses.

8. The Employer interfered with laboratory conditions by changing employees' work reporting times and instructing them to report to the worksite early to board a charter bus or shuttle to the polling location.

9. The Employer interfered with laboratory conditions and intimidated and interrogated employees to determine their position on unionization.[3]

10. During the critical period, the Employer engaged in surveillance of union meetings resulting in destruction of the laboratory conditions of the election.

11. During the critical period, the Employer, through upper management and its observer, Courtney Kostew, threatened employees with job loss and closure of the theater shows if the Union won the election. This was widely disseminated.

12. During the critical period, the Employer disrupted the laboratory conditions by altering employees' work schedule to conduct six-hour captive audience meetings.

13. During the critical period, the Employer disrupted the laboratory conditions by taking adverse actions against known union supporters that negatively impacted terms and conditions of employment.

14. The Employer maintained unlawful workplace rules in its employee handbook.

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[2] Charging Party amended Objection 4 on the record. *See*, Tr. 2448:6-12.
[3] Charging Party amended Objection 9 on the record. See, Tr. 2449:9-25.

B. ARGUMENT

The credible evidence in the record shows the Employer's acts tended to interfere with the employees' freedom of choice, and as a result the Union requests one of two remedies:

- Set aside the results of the election and direct a new election, *see, Jurys Boston Hotel*, 356 NLRB 927 (2011); *Robert Orr-Sysco Food Services*, 338 NLRB 614 (2002), or;
- In the alternative, if the General Counsel prevails in the consolidated Unfair Labor Practice cases as to reinstatement of a majority of the seven discriminatees who voted subject to challenge, the Union requests that, instead of a new election, the challenged ballots previously cast be opened and counted.

1. Standard for Election Objections

In evaluating whether to set aside an election, the Board applies an objective test. In particular, the question is whether the conduct by the offending party has "the tendency to interfere with employees' freedom of choice." *Cambridge Tool Pearson Education, Inc.*, 316 NLRB 716 (1995). In other words, the question is not whether a party's conduct in fact interfered with free choice, but rather whether the party's misconduct tended to interfere with the employees' right to make a free and uncoerced choice in the election. *Baja's Place*, 268 NLRB 868 (1984).

In determining whether the conduct has the tendency to interfere with the employees' freedom of choice, the Board considers: 1) the number of incidents; 2) the severity of the incidents and whether they are likely to cause fear among employees in the bargaining unit; 3) the number of employees in the bargaining unit subjected to the misconduct; 4) the proximity of the misconduct to the election; 5) the degree to which the misconduct persists on the minds of the bargaining unit employees; 6) the extent of dissemination of the misconduct among the bargaining unit employees; 7) the effect, if any, of misconduct by the opposing party to cancel out the effects of the original misconduct; 8) the closeness of the final vote; and, 9) the degree to which the misconduct can be attributed to the party. *See*, *Cedars-Sinai Med. Ctr.*, 342 NLRB

596, 597 (2004).

Pre-election conduct that constitutes an unfair labor practice is a *fortiori* conduct that improperly interferes with the election process, "unless it is so de minimis that it is 'virtually impossible to conclude that [the violation] could have affected the results of the election." *Airstream, Inc.*, 304 NLRB 151, 152 (1991), *enforced*, 963 F.3d 373 (6th Cir. 1992) (quoting *Enola Super Thrift*, 233 NLRB 409, 409 (1977). Additionally, "[c]onduct that creates an atmosphere which renders improbable a free choice will sometimes warrant invalidating an election, even though that conduct may not constitute an unfair labor practice . . ." under Section 8(a)(1). *General Shoe Corp.*, 77 NLRB 124, 127 (1948).

The evidence presented in the matter overwhelmingly reflects reasonable doubt as to the fairness of the election, and prejudice caused by the Employer's numerous unlawful acts, particularly its blatant termination of union-supporters.

2. <u>Support for Objection No. 1</u>

The Employer discharged eleven pro-union employees, and thus tainted the ability to have a fair election.[4] *See*, *Airstream, Inc.*, 304 NLRB 151, 152 (1991). The Employer's actions

[4] The Union's Objection No. 1 is directly covered by the General Counsel's Consolidated Complaint and squarely overlaps with the Union's position on the challenged ballots. Under *Wright Line*, 251 NLRB 1083 (1980). enfd. 662 F.2d 800 (1st Cir. 1981), cert denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), the General Counsel established a prima facie showing that the Employer's discharge of the eleven discriminatees was motivated, at least in part, by their union or other protected concerted activity. *See, id*. The burden shifts to the employer to demonstrate that it would have taken the same action against the employees even without regard to any union or other protected activity the employees may have engaged in. To effectively rebut a prima facie case, an employer cannot simply present a legitimate reason for its action, but must persuade by *a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct*. *McGaw of Puerto Rico, Inc.*, 322 NLRB 438, 449 (1996); *Reno Hilton*, 282 NLRB 819, 841 (1987). The Respondents have failed to do so. For example, the Employer's HR Representative, Takeshia ("T.C.") Carrigan, testified that other than the layoff of the ancillary photography department, she could not provide a single example of a similar mass termination of *production crew employees* within a short time frame as occurred in March and April 2018. *See*, Tr. 748:12 – 749:19 [Ms. Carrigan's testimony conceding that there was no history of mass terminations of production crew employees other than that which occurred in March 2018 and April 2018]; Tr. 191:13-24 [testimony relating to the "shit list" that David Saxe and Tiffany DeStefano created to plot out which employees to terminate in March and April 2018]. The terminations of all union supporters occurred within the heart of a union organizing campaign, and in the two months leading up to the union election, reveals the true intent behind the discharges.

were intended to chill employees' efforts to unionize and exercise free choice in electing a union. The Union joins in the General Counsel's request for remedies for the companion unfair labor practices alleged in the Complaint and for the same reasons, asserts that this Objection alone warrants a re-run election. In the alternative, should the ALJ determine the Employer committed unfair labor practice charges in the consolidated matter pursued by the General Counsel resulting in at least the reinstatement of a majority of the seven discriminatees who voted subject to challenge, then the Union requests the order with respect to its Objections be that the challenged ballots cast in the May 17, 2018 election by the reinstated discriminatees who voted subject to challenge be opened—rather than conduct a new election, that all seven challenged ballots should be opened and counted.[5] The serious nature and extent of the violations, and the anticipated and actual impact of the discriminatory terminations upon statutory rights that is expected to continue unless a Board order issues, warrants such relief.[6] Eleven terminations shortly followed after the Employer became aware of the union organizing campaign, including meetings that occurred between employees and union representatives on or around March 1 and March 13, 2018, respectively. Active and prominent union leaders in the workplace, Zachary Graham, Leigh-Ann Hill and Jasmine Glick, along with other known union supporters, were all deprived of their jobs in the weeks after engaging in efforts to support unionization during an active union campaign.

[5] The challenged ballot voters would not have been terminated were it not for the union campaign, and therefore their votes should be counted.

[6] The Employer terminated numerous employees who voted by challenge, including Taylor Benavente Bohannon, Kevin Michaels, Zachary Graham, Nathaniel Franco, Alanzi Langstaff, Leigh-Ann Hill, and Jasmine Glick, based on union activity. They all consistently testified that they were terminated within just days or weeks following their first meetings with the Union on or around March 1 and March 13, 2018 and following workplace discussions wherein they made efforts to unionize their workplace. If a Board order issues finding that those challenged ballot voters' terminations were based on union activity, their ballots should be opened and counted.

a. Legal Standards

The hasty removal of eleven union supporters from the workplace, a hallmark violation, is unforgettable to employees. *See, e.g., Michael's Painting, Inc.*, 337 NLRB 860, 861 (2002), enfd. 85 Fed.Appx. 614 (9th Cir. 2004); *Playskool Mfg. Co.*, 140 NLRB 1417, 1419 (1963) (finding "conduct of this nature which is violative of Section 8(a)(1) is, a *fortiori*, conduct which interferes with the exercise of a free and untrammeled choice in an election" in a case involving threats of discharge made to leading union adherents); *Dal-Tex Optical Co.*, 137 NLRB 1782, 1786-1787 (1962) (finding employer's use of language intended to convey to employees the danger of their designating the Union interfered with the exercise of free choice).

The Board has recognized that discriminatory discharges constitute the most serious "nip-in-the-bud" violations of the Act, given their perceived potency in deterring union activities. Likewise, this misconduct falls squarely within the parameters of such objectionable conduct recognized by the Board as the most serious of violations. *See, e.g., Playskool Mfg. Co., supra*, 140 NLRB at 1419 (even threats of discharge found to interfere with laboratory conditions expected in union elections).

b. Factual Support for Relief Sought

The Employer's successive termination of eleven employees known to support the union organizing effort undermined the employees' ability to discuss union organizing or to vote in an election free from the taint of the Employer's intimidation.[7] *See, Playskool Mfg. Co., supra*, 140 NLRB 1417. Terminated employees testified they were told they were being terminated either due to restructuring, third parties filling their positions or, in some cases, due to poor job

[7] In Michael Gasca's case, he was known to be a union supporter because he requested leave from the Employer to undergo training with the International Brotherhood of Teamsters.

performance.[8] The terminations sent the message to the remaining employees that they would be left powerless and/or in very real threat of losing their jobs if they supported the Union.

There is no evidence put on by Respondents that any restructuring materialized or that third parties were brought in the fill any of the terminated positions. At hearing, the Employer's management witnesses testified to a whole host of additional job performance problems to try to concoct legitimate reasons for the terminations – often at the point of exaggeration and in an apparent effort to see if something may stick.[9] What the Employer did not provide was evidence that any of the discriminatees had received written disciplinary warnings for the alleged performance issues prior to the terminations, or that the Employer gave employees adequate coaching or opportunity to correct alleged insufficiencies in their performance prior to being terminated. Tiffany DeStefano and David Saxe testified that they had made the decision to terminate the employees on their "shit list" on or around January 2018, but former manager

[8] Out of a concern for judicial economy, rather than separately briefing the complete set of circumstances underlying each individual discriminatees' termination, the Union reiterates its joining in the General Counsel's brief on those points. The same evidence supporting the Complaint's allegations that each termination is based on the employee's union activity, and that the Employer's stated reasons for the terminations are pretext for discrimination, likewise supports the Union's Objection No. 1 and the Union's position on the seven challenged ballots. The general pattern with all terminations showed collusion between Ms. Saxe and Ms. DeStefano to come up with stated reasons for the terminations, even though the circumstances overwhelmingly show they were in fact based on union activity. *See*, *e.g.*, GCX 10 [Ms. DeStefano and Mr. Saxe discussing what reason to provide for Mr. Franco's termination]; GCX 18 [Ms. DeStefano approved Leigh-Ann Hill's request for leave to take temporary work prior, yet fired Ms. Hill's for making an equivalent leave request]. In addition, Ms. DeStefano reported in an email on March 12, 2018 that cue caller Zach Graham was "out due to a broken arm + surgery on it this week. This is why he doesn't show any hours," yet the Employer fired Mr. Graham for absenteeism and not having a doctor's note just over two weeks later on March 21, 2018. GCX 24; *see also*, GCX 53. Additionally, a May 21, 2018 email from Ms. DeStefano to David Saxe, TC Carrigan and Saxe's in-house counsel Anthony Ciulla attaches after-acquired time punches for Alanzi Langstaff and states "I can go even further back and show more proof if that is needed." GCX 25. This email, sent two months after Mr. Langstaff's termination, shows the Employer trying to gather "proof" to substantiate the termination after-the-fact. *Id.* Further, Ms. DeStefano recognized Taylor Bohannon as "a great audio tech" in an email, but then two weeks later, terminated her for alleged job performance problems. GCX 19.

[9] Tiffany DeStefano, in a thinly-guised effort to come up with some outwardly-appearing legitimate basis for the terminations, sent a string of emails to David Saxe over a single evening explicating the alleged job performance problems of six of the discriminatees. GCX 4, 5, 6, 7, 8, and 9; *see also*, GCX 3 [March 15, 2018 text string showing a plan between Mr. Saxe and Ms. DeStefano to come up with stated reasons for the terminations when Ms. DeStefano states "I'm almost home and I'll get started on emails if you need anything else let me know."]

Jason Pendegraft apparently single-handedly held back their "restructuring" plan. Mr. Pendegraft was terminated, but based on David Saxe's testimony as to the various criminal charges alleged against Mr. Pendegraft, including embezzlement of company property. Such evidence is convincing that his termination was a result of the criminal charges, not a failure to carry out the alleged plan in January 2018 to restructure.[10] Mr. Saxe also conceded such. Other than Tiffany DeStefano and David Saxe's often long-winded, inconsistent, and biased testimony, Respondents put forward no documentary or other evidence to prove there was in fact a formal decision made in January 2018 to terminate all eleven discriminatees in one fell swoop.

The successive terminations of union supporters overwhelmingly suggest conduct having a tendency to interfere with free choice, which justifies a new election. *See, Cambridge Tool Pearson Education, Inc.*, 316 NLRB 716 (1995); *Airstream, Inc.*, *supra*, 304 NLRB at 152.

i. Employer's Knowledge of Union Activity

Evidence at hearing proved the Employer's knowledge of the organizing effort.[11] Terminated employees observed a "buzz" in the workplace about the desire to become unionized as employees discussed it in the back stage areas and passed out cards in the adjacent parking lot.[12] Eleven members of the production crew, 20% of the crew, were all terminated within just under a two month-time span, and 6 of the 11 were terminated within days of each other. As Production Coordinator Tiffany DeStefano reported the terminations at meetings with the production crew; door codes were changed after a termination; employees reported terminations

[10] Evidence and Ms. DeStefano's testimony at hearing showed that Tiffany DeStefano and David Saxe wanted to terminate discriminatee Scott Tupy, also a union supporter, but they had to wait to train someone else because Mr. Tupy was skilled in his lighting position. GCX 31 [Ms. DeStefano's email stating in relevant part "HAS NOT HAPPENED YET…it will in a week or so but just so you have the documentation."] The Employer's desire to rid of a skilled employee further evidences the intent to clear the workplace of union supporters.

[11] Employees' union activity took place in the form of participation in the Facebook group chat relating to unionization and planning meetings with the Union; speaking to fellow employees about unionization at or near the work site and/or attending meetings with the Union to discuss unionization.

[12] Mr. Estrada admits to observing Zach Graham passing out union cards. Tr. 3101:24 – 3102: 16.

in the Facebook group chat and employees no longer saw their co-workers at work, knowledge of the terminations were widespread among the production crew.[13] *See*, JTX 2.

In addition, given Courtney Kostew's participation in the Facebook group chat regarding organizing, the inference is strong that management learned of who supported unionization and of the discriminatees' planned meetings with the Union through the group Facebook thread. The group chat occurred among the majority of the stagehand, lighting and audio technician employees and was focused on unionization, support for having a union in their workplace and their planned meeting with the Union on or around March 1, 2018.[14] *See*, JTX 2. Courtney Kostew, who is and at the time was in a serious relationship with Stage Manager Thomas Estrada, became vocally anti-union in the group chat. The timing of the terminations in the weeks following their participation in the group chat suggests a strong circumstantial inference that Ms. Kostew informed stage manager Thomas Estrada about the participants in the group, and that he shared the information with Tiffany DeStefano as he acted as "her eyes and ears" as to what the production crew was doing. In addition, Ms. Kostew sent employee Bryce Perry's mother electronic messages to voice her anti-union views and try to convince Bryce through her that the Employer should not be unionized. CPX 8(a)-(c). Thus, given Ms. Kostew's evident anti-union animus, there is a strong and persuasive inference that Ms. Kostew informed her significant other, Mr. Estrada, of the participants in the group chat thread and of the employees' plans to meet with the Union. Further evidence that Ms. Kostew informed management about the group chat is the timing of Ms. Hill's termination. Ms. Hill's termination on March 2, 2018 came within a day or two after the first employee meeting with the Union and the same day as a

[13] The effect left by the terminations was not likely dissipated considering the relatively small size of the bargaining unit, compared to the number of terminated employees, along with the evidence showing that knowledge of the discriminatees' removal quickly spread through the showrooms and the warehouse. *See, Michael's Painting, Inc., supra*, 337 NLRB 860. Moreover, employees were not given contemporaneous or after-the-fact assurances that the removal from the workplace was unrelated to the union campaign and election. *See, id*.

[14] Courtney Kostew, who was the Employer's observer, was included in the group Facebook chat during the discussions wherein employees voiced their support for the union before being removed from the chat by Leigh-Ann Hill on or about March 1, 2018.

dispute with Ms. Kostew in the chat group when Ms. Hill made clear she was pro-union; whereas Kostew said she was "aggravated" and "tapping out" from supporting the Union. JTX 2; Tr. 1030:20 – 1032:14 [Ms. Hill testifying that she was terminated the day after her argument with Ms. Kostew in the Facebook chat regarding unionizing].

In the next several weeks following the mass terminations, on or around April 23, 2018, Ms. Kostew was elevated to the position of calling cue at shows, which is a position of respect as that job position is responsible for ensuring the shows run smoothly. That position had formerly been held by a lead union supporter, Zachary Graham. Mr. Graham was regarded as skilled and respected, as evidenced by the testimony of Thomas Estrada who testified that Mr. Graham was his go-to, right-hand man, or words to that effect. In light of this background, Mr. Graham's termination sent a message to the production crew that if he could be terminated for supporting the Union, anyone could be terminated. The timing of Ms. Kostew's elevation to the position of calling cues also establishes a strong inference of the Employer's knowledge of the union activity and effort to grant her a benefit and shield her from adverse actions in exchange for her assistance in preventing unionization.

ii. Employer's Anti-Union Animus Further Shows the Discriminatory Intent behind Terminations

The discriminatory intent and animus of the Employer is evident principally from the close proximity between the terminations and the discriminatees' participation in union activity, along with the sheer number of terminations of union supporters within a relatively brief time span. The various text messages between David Saxe and Tiffany DeStefano, clearly evidencing their anti-union views, provides the documentary support for the discriminatory intent already apparent from the timing and scope of mass terminations of pro-union employees during a union organizing campaign. GCX 35 [Mr. Saxe stating "union is official…;" Ms. DeStefano responding: "shit"]; *see also*, GCX 55 [Ms. DeStefano stating to Mr. Saxe "…there will always be stupid people, but you will have control vs. the asshole union and lawyer bullshit."]. The Employer's swift and successive termination of multiple known union supporters in close

succession on dates including March 2, 17, 18, 19, 21, April 2 and 17 based on an alleged, but never executed plan to "restructure to third parties" evidences the Employer's discriminatory intent. The only restructuring that took place was to eliminate enough pro-union employees from the equation, and create fear among those that remained, to try to sway the election results in the Employer's favor.

Further evidence of the Employer's discriminatory motivations is the evidence showing that Tiffany DeStefano called a last-minute, late-night work call to take place right after a show, the same evening as a planned union meeting on March 13. Respondents did not present evidence that last-minute work calls at this time of night (close to midnight) or of this involved, lengthy nature had occurred before at the Saxe and V Theaters. The work call allowed management to monitor which employees reported to work and/or left early ostensibly to attend the union meeting that same night. Within the next week after March 13th, multiple employees were then terminated on dates including March 17, March 18, March 19, and March 21. GCX 4, 5, 6, 7, 8 and 9 [showing Tiffany DeStefano sent successive emails to David Saxe to document so-called reasons for terminations and to obtain his approval].[15]

Additionally, evidence at the hearing showed that the V and Saxe Theaters have pervasive security cameras throughout the showrooms, including in the backstage areas wherein the production crew work and take breaks and in the adjacent parking lot where employees met to discuss unionization. Tr. 80:5 -84:5 [David Saxe testified to the over a hundred surveillance cameras on premise, many with audio recording capabilities, which are actively and regularly monitored by Tiffany DeStefano and himself]; Tr. 1364:12 – 1365:13 [Jasmine Glick testified to a phone conversation with David Saxe wherein he asked her how she knew she was being

[15] David Saxe testified that a last-minute work call was made on March 13 due to a safety issue with the stage, but evidence at hearing showed the stage had been in disrepair earlier. The timing suggests that the work call was not made solely with intent to urgently repair a stage, rather it was done to engage in surveillance of who attended the work call, who left early from the work call, and who did not attend the call to determine which employees attended the meeting with the Union on March 13. *See, e.g.*, Tr. 1521:18 – 1522:7. Mr. Estrada asked Ms. Kostew send a message to the stagehands requesting volunteers for a stage repair project after hours that night, indicating that the request came from Saxe. Tr. 901:5-18; GCX 59.

watched on the security cameras]; Tr. 1368:10-17; Tr. 1372:2-11[testimony regarding a termination that took place after viewing security camera footage]; Tr. 2267:5-25.

In addition to the security cameras, the evidence also showed that some of the pro-union employees who were terminated were observed by either David Saxe, Thomas Estrada or other management-level employees talking about unionization at or near the theaters. Tr. 3101:24 – 3102: 16; Tr. 1826:2-24. Thomas Estrada testified that he often smoked in the parking lot adjacent to V Theaters where he could hear conversations of his co-workers. *See,* Tr. 3101:24 – 3102: 16 [Estrada testified to seeing Zachary Graham in the parking lot passing out union cards and/or union literature]. Discriminatees met in the same parking lot to plan meetings with the Union and discuss the union organizing campaign. *See, id.*; *see also,* Tr. 1368:10-17. In fact, Thomas Estrada warned Alanzi Langstaff that it was not a good idea for him to be seen talking to Zachary Graham - a known, lead and vocal union advocate and campaigner – right after Mr. Estrada observed Mr. Graham passing out union cards. Tr. 1826:2-24 [Alanzi Langstaff testified that Mr. Estrada witnessed Zach Graham passing out union literature in the parking lot around February 2018, and afterward Mr. Estrada told Mr. Langstaff "to be careful talking to Zach, or he wouldn't be seen talking to Zach."]. Mr. Estrada reported seeing Zach Graham passing out union cards to Tiffany DeStefano who responded that "she'll take care it." Tr. 3103:25-3104:22. The evidence is convincing that the Employer both knew of the union activity and harbored anti-union animus, and thus, terminated the eleven discriminatees based on that union activity.

c. Conclusion regarding Objection No. 1

All of the evidence cited herein, particularly the close proximity of the mass terminations with the discriminatees' union activity and February 28, March 1 and March 13 meetings with the Union; the filing of the RC petition and the union election; establish the requisite nexus to show that the terminations were discriminatory. The Employer's conduct leading up to the May 17 election showed significant efforts to prevent unionization through any means possible. The eleven terminations objectively have a tendency to interfere with free choice because of: (1) the number of terminations in close proximity of time in the two months leading up to the union

election; (2) the high likelihood that those widely-known terminations caused fear among employees; (3) the lack of any effort by the Employer to cancel out the effects of the terminations on a fair election process; and (4) the closeness of the final vote. *See, Cedars-Sinai Med. Ctr.*, 342 NLRB 596, 597 (2004); *see also, Airstream, Inc.*, supra, 304 NLRB at 152; *see*, GCX 1(k) [Tally of Ballots].

The message sent among employees following the mass terminations and just before the union election that took place, is that David Saxe won, the terminated employees are gone, and the production crew is left unable to unionize their workplace. Thus, this objection should be upheld and a re-run election is warranted, the companion unfair labor practice charge should be found to have merit, and the seven challenged ballots should be opened and counted if a majority of the challenged ballot voters are reinstated.

3. <u>Support for Objection No. 2</u>

The Employer provided an inadequate voter eligibility list based on at least two grounds. First, the Employer failed to include company-issued email addresses as to all employees. Second, the Voter List provided failed to include contact information for the eleven employees terminated during the critical period for union activity.

Section 102.62(d) of the Board's *Rules and Regulations* provides, "the employer shall provide to the Regional Director and the parties named in the agreement or direction a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cellular ("cell") telephone numbers) of all eligible voters." An employer's failure to file or serve the list within the specified time or in proper format is grounds for setting aside the election. *Id.*

Mr. Josh Prieto testified that employees have company email addresses that the Employer uses weekly to distribute work schedules and other work communications. Numerous exhibits offered by the Employer confirmed the Employer regularly communicates with employees via company-issued email addresses. *See, e.g.*, GCX 101 (emails to Urbanski assigning tasks, including text message from DeStefano asking Urbanski to check his "work email"). Not a single

witnesses called by the Employer denied the existence of the company-issued email addresses, or that the Employer regularly used those addresses to communicate with employees.

Indeed, the Employer's "Company Email Address" policy plainly states: "IT IS IMPERATIVE THAT YOU USE THE COMPANY EMAIL ADDRESS TO CONDUCT ALL COMPANY BUSINESS. YOU WILL BE RECEIVING IMPORTANT COMPANY INFORMATION AT THIS EMAIL ADDRESS, SUCH AS SCHEDULES, NEW/UPDATED POLICIES, HANDBOOKS, NOTIFICATION OF BENEFITS, TASKS, ETC." *See*, RX 62(a). Yet, these very company email addresses were not provided on the voter eligibility list. *See*, CPX 7. The voter eligibility list only provided personal email addresses for roughly half of the employees on the list.

The Voter List is also inadequate because it failed to include discriminatorily discharged employees Taylor Benavente Bohannon, Kevin Michaels, Zachary Graham, Nathaniel Franco, Alanzi Longstaff, Leigh-Ann Hill, Jasmine Glick, Scott Leigh, Chris Suapaia, Mike Gasca, and Michael Koole. As described above with respect to Objection No. 1, these employees were properly in the bargaining-unit, should have been eligible to vote and were required to be included on the Voter List.

4. <u>Support for Objection No. 3</u>

The Employer provided wage increases to employees included in the bargaining unit during the critical period after the Employer was on notice through its management employees, including although not limited to the Stage Managers, of the union organizing effort.

Promises of benefits alone made by an Employer during the critical period before an election are objectionable. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 616-618 (1969); *General Shoe Corp.*, 77 NLRB 124 (1948). Implied promises are also sufficient to set aside an election. *Etna Equipment & Supply Co.*, 243 NLRB 596 (1979). The Board presumes that going a step further and granting benefits during an organizational campaign is objectionable "unless the Employer establishes that the timing of the action was governed by factors other than the pendency of the election." *American Sunroof Corp.*, 248 NLRB 748 (1980); *Honolulu Sporting*

Goods, 239 NLRB 1277 (1979); *Garda CL Great Lakes, Inc.*, 359 NLRB No. 148 (2013) (grant of benefits found to be a Section 8(a)(1) violation and objectionable).

Both management witnesses and those called by the General Counsel and Union confirmed that bargaining-unit employees were given raises, changing their pay to $17.00, on approximately March 15, 2018. *See*, GCX 97 (changing employee wage rates to $17.00 for approximately 34 employees ***effective*** *March 15, 2018*); Tr. 1955:2-1956:1 (Prieto).[16]

Management was on notice of the union organizing effort in late February 2018, including notice to Stage Manager Daniel Mecca on February 21, 2018. Stage Manager Tommy Estrada and Tiffany DeStefano were at least aware as of February 28, 2018. Stage Manager Steve Sojack also knew as of February 28.

Employees added Stage Manager Daniel Mecca to the employee Facebook group chat on about February 21, although he was eventually removed from the group on March 2. JTX 2 at 3, 31. Estrada testified about an incident where he witnessed Graham passing out union authorization cards in February. Tr. 3101:20-3102:2. Graham testified that after the first meeting with the Union, on February 28, he went to the theaters both to speak with DeStefano about FMLA, and also to speak with the stagehands about unionizing. Tr. 1651:4-1653:20. Stage Manager Tommy Estrada testified that he called DeStefano and told her that Graham was "out here passing union cards ..." Tr. 3104:5-19. Estrada asked whether he should say anything to

[16] The "Effective Date" on the top right corner of the Personnel Action Forms in GCX 97 primarily states 3/5/18. However, in the Review History section at the bottom/middle of the page, under "Action" and "Final Approved" the majority of the Forms state that final approval was not given until the afternoon or evening of 3/15/18.

For example, Michael Gasca's Form (GCX 97 at 13, DSP – 4683) states: 3/15/18 at 8:14:01 p.m. Similarly, Alanzi Langstaff's raise to $17 did not take effect until March 15, 2018 at approximately 12:23 p.m. (GCX 97 at 21, DSP – 4691). Zach Graham's raise also was finally approved on March 15, 2018 at approximately 8:13 p.m. (GCX 97 at 15, DSP – 4685).

Saxe instructed payroll in an email dated March 14, 2018 to make the wage increase retroactive, "(so their new rate went in last week)." GCX 15.

The fact that the Employer gave employees it terminated within days for so-called performance or other issues $2 wage increases just before they were fired only further supports the General Counsel and Charging Party's position that, in reality, the Employer terminated the discriminatees for engaging in union organizing efforts.

Graham, and DeStefano replied, "No, just leave him alone." Tr. 3104:18-22. A few days after Prieto went to the February 28 union meeting, he told Stage Manager Sojack about it. Tr. 1939:5-1940:2.

On March 11, Kostew disclosed to Prieto that Estrada had, at least as of March 11, warned her about the potential consequences of unionizing. After Prieto looked for Kostew at the Saxe Theater (when he overheard Estrada threatening to "put an end to the union shit"), Kostew and Prieto started messaging through Facebook. In response to Kostew saying she heard he was looking for her, Prieto responded that he was because he wanted to see how she was feeling about the union organizing effort. GCX 58. Kostew responded, "I was all about it but I think I'm gonna tap out. Tommy [i.e., Estrada] said the other few times there have been union possibilities everyone involved was fired and I cannot afford to lose this job." *Id*. This written statement confirms that before March 11 Estrada was aware of the union organizing effort, in addition to his admissions discussed above that he knew in February when he saw Graham collecting union authorization cards.

Management conducted a "production meeting" that included DeStefano, Estrada, Mecca and Sojack on March 15, 2018. Respondents' case failed to provide any support for their position that the wage increase was planned for months prior to Saxe's authorization. Attempting to distract from the issue, Respondents claim that former supervisor Pendegraft was supposed to increase wages as far back as January, but never did. However, aside from Saxe's self-serving testimony on this issue, the record reflects no evidence of this claim. In fact, documents show otherwise. An email shows that it was Pendegraft who proposed increasing wages for theater employees in December, contrary to Respondents' contention that Saxe was the one who directed Pendegraft to do so. RX 76. Clearly, although Pendegraft, and possibly others, suggested increasing wages to remain competitive in the industry months before the union campaign, Respondents took no action on those suggestions *until* they learned about the stirrings of a union organizing effort.

Moreover, other documents show that Saxe was contemplating an entirely different type of wage change just prior to the implementation of the hourly wage increase. Records show that as late as March 4, 2018, Saxe was considering paying production employees based on a flat rate, per show, rather than hourly. GCX 13; GCX 98. Again, this indicates that Saxe's decision to increase wages as he did on March 14, was not, in fact, planned for months as Respondents contend.

Therefore, the Employer provided the $17/hour wage raise *after* union activity started, and after management knew of the union activity. Prior to the beginning of union activity, there had been no statements made from management to bargaining-unit employees about providing wage increases. The timing and corroborating evidence shows the Employer unlawfully provided a benefit to bargaining-unit employees in an attempt to influence their decision about whether or not to vote for the Union.

5. <u>Support for Objection No. 4</u>

The Employer intimidated voters and engaged in surveillance, including through the Employer's agent, Courtney Kostew, whose agency existed due to her: (a) serious relationship with Stage Manager Thomas Estrada, (b) designation by the Employer as its election observer, and (c) promotion to cue caller and/or assistant stage manager.

The burden of proving agency is on the party asserting it. *Millard Processing Services*, 304 NLRB 770, 771 (2008). Apparent authority is created through a manifestation by the principal, here DSP, to a third party, here Courtney Kostew, that supplies a reasonable basis for the latter to believe that the principal has authorized the alleged agent to do the acts in question. *See*, *NLRB v. Donkin's Inn*, 532 F.2d 138, 141, (9th Cir. 1976); *Alliance Rubber Co*., 286 NLRB 645, 646 fn. 4 (1987). Two conditions must be satisfied to establish apparent authority: (1) there must be some manifestation by the principal to a third party, and (2) the third party must believe that the extent of the authority granted to the agent encompasses the contemplated activity. *Millard Processing Servs., Inc*., supra, 304 NLRB 770, 771 (1991)(citing Restatement 2d,

Agencys 27 (1958, Comment) § 8)). For the below reasons, the conditions are met to establish Ms. Kostew acted as an agent for DSP. *See, id.*

a. Kostew's relationship with Stage Manager Thomas Estrada

Numerous witnesses testified it was commonly known by employees that Courtney Kostew is in a serious relationship with Stage Manager Thomas Estrada. Kostew and Estrada also admitted as much. Kostew and Estrada have been in a relationship of a romantic nature since the beginning of 2017—roughly a year prior to the union organizing effort. Tr. 860:12-25. Likely because they wanted to make it seem more believable that they would not have discussed the union organizing effort with each other, they both tried to minimize the extent of their relationship as of February or March 2018, despite the fact that they had been together for a year at that point. Tr. 815:19-816:7; 860:19-22; 2481:11-24; 3106:9-20. Even then, they could not deny that they spoke to each other every day outside of work in February 2018. Tr. 861:1-7.

b. Kostew's designation by the Employer as its election observer

It is undisputed that management appointed Kostew as its election observer.

In her Facebook message to Bryce Petty's mother on a few hours before the election began, Kostew wrote: "David Saxe asked me to represent us." CPX 8(a) and (b). This statement alone reveals that management and Kostew viewed Kostew as a representative of the Employer leading up to and at the election.

c. Kostew's promotion to cue caller and/or assistant stage manager

Kostew sent out messages on behalf of Estrada to the crew to arrange for them to come in to work. Tr. 900:21-901:18; GCX 58. This alone evidences her status as either a supervisor or an agent of the Employer.

Employees in the bargaining-unit perceived Kostew to be a supervisor or agent of the Employer. Scott Tupy referred to Ms. Kostew as a supervisor when he explained which of the "supervisors" were present at a captive-audience anti-union meeting: "Everybody from the first meeting, and then Tiffany was there, Courtney was there, Tom was there. Those are the

supervisors I noticed." Tr. 1750:12-15. Similarly, Petty testified that he understood Kostew to be a supervisor because she called cues.

Kostew admitted that she asked Estrada to call a meeting of stagehands in the evening before the election. Estrada instructed stagehands to stay for the meeting, which they did, following the orders of their supervisor, Estrada. Although it was Kostew who led the discussion in the meeting to share with employees why she planned to vote no the next morning, and implying why others should follow suit, *Estrada was present during the meeting*. *Id.* This constitutes a per se violation and objectionable conduct within 24 hours of an election.

Urbanski testified that he witnessed one employee shake and appear visibly upset at the ballot box, return his uncompleted ballot and decline to vote. Urbanski testified that he regularly works with the individual and that the individual does not ordinarily exhibit signs of shaking or appearing visibly upset. While there is no direct evidence in the record reflecting that the reason the individual was exhibiting outward signs of distress was due to the presence of Kostew, someone he perceived as an agent of management, circumstantial and indirect evidence reflects the atmosphere of intimidation surrounding this election and at the polling location caused by the Employer. Kostew acted as an agent of management and effectuated objectionable election conduct sufficient to warrant setting aside the election.

6. <u>Support for Objection No. 5</u>

The Employer interfered with the laboratory conditions of the election by failing to post the NLRB's required Notice of Petition in all applicable break rooms and conspicuous places visible to eligible voters.

Section 102.63(a)(2) of the Board's *Rules and Regulations* provides:

> Within 2 business days after service of the Notice of Hearing, ***the employer shall post the Notice of Petition for Election in conspicuous places***, including all places where notices to employees are customarily posted, ***and shall also distribute it electronically if the employer customarily communicates with its employees electronically***. … The employer shall maintain the posting until the petition is dismissed or withdrawn or the Notice of Petition for Election is replaced by the Notice of Election. ***The employer's failure properly to post or distribute the***

> ***Notice of Petition for Election may be grounds for setting aside the election*** whenever proper and timely objections are filed under the provisions of §102.69(a) (emphasis added).

CPX 1 and 4 reflect copies of photos of the area wherein the Notices of Petition were not posted in a manner which would have been viewable by eligible voters.

The first of these photos was taken on or around April 30, 2018 by Josh Prieto. The second of these photos was taken on or around May 2, 2018 by Scott Tupy. The photos show a timeclock keypad and other nearby work-related postings easily viewable by eligible voters. Prieto and Tupy testified that they did not observe the Notices of Petition posted in conspicuous places viewable by the production crew in the week following the filing of the RC petition.

Moreover, Prieto testified at length regarding the fact that, for a period of time, the Notices were posted in a locked room not accessible by employees. Ultimately, management unlocked the door to the area, but the Notices were still posted directly in front of management offices. Any employee trying to read the Notices to gain more information would have to do so standing directly in front of a manager's suite of offices, and risk being considered a union supporter.

Failure to post or distribute the Notice of Petition for Election in the manner required is a per se violation that may be grounds for setting aside an election. Taken in context with the Employers' other objectionable conduct as set forth herein, this violation warrants setting aside the election.

7. <u>Support for Objection No. 6</u>

The Employer interfered with laboratory conditions by surrounding the Notice of Elections with "vote no" signs and other anti-union propaganda.

Elections will be set aside based on "the deceptive manner in which a [a campaign representation] was made.' . . . As long as the campaign material is what it purports to be, i.e., mere propaganda of a particular party, the Board would leave the task of evaluating its contents solely to the employees." However, where, due to forgery, no voter could recognize the

propaganda "for what it is," Board intervention is warranted. *Midland National Life Insurance Co.*, 263 NLRB 127 (1982); *Durham School Services, 360 NLRB 851 (2014).*

Elections are set aside when an "official Board document has been altered" to suggest that the Board is endorsing a party to the election. *Id*. at 133.

The Board has determined that where misstatements of Board action were accompanied by an altered Board document, such misrepresentation of Board publications was unlawful. *See*, *Novelis Corp.*, 364 NLRB No. 101 (2016) (In a consolidated R/ULP case, the Board—during the course of discussing the propriety of a *Gissel* bargaining order—considered a redacted letter from the NLRB Regional office displayed by the employer at a captive audience meeting, which the employer misrepresented as containing union-filed ULPs that, if upheld, would force the employer to rescind a restored benefit. The Board characterized this as an "unlawfully false and misleading allegation.")

CPX 2 and 5 reflect copies of photos of the area wherein the Notices of Election were surrounded by "vote no" signs and anti-union propaganda. These photos were taken on or around May 14, 2018 by Josh Prieto, and on or around May 15, 2018 by Scott Tupy. Josh Prieto testified as to his observations of the Notices of Election being surrounded by "vote no" signs and anti-union propaganda. Prieto indicated that it was highly confusing to employees as to whether the "vote no" signs were part of the official NLRB postings or not because of their very close proximity to the NLRB Notices and that this caused him concern.

Taken in context with the Employers' other objectionable conduct as set forth herein, this violation warrants setting aside the election.

8. <u>Support for Objection No. 7</u>

The Employer interfered with laboratory conditions by failing to distribute the Notice of Election to employee's regularly-used company email addresses.

Section 102.63(a)(2) of the Board's *Rules and Regulations* requires the Employer "***shall also distribute [Notice of Petition for Election] electronically*** if the employer customarily communicates with its employees electronically (emphasis added)." Similarly to the Notice of

Petition of Election, employers shall post and distribute the Notice of Election in accordance with §102.67(k), which provides, "[t]he employer shall post copies of the Board's Notice of Election in conspicuous places, including all places where notices to employees in the unit are customarily posted, at least 3 full working days prior to 12:01 a.m. of the day of the election and shall also distribute it electronically if the employer customarily communicates with employees in the unit electronically."

The Employer's failure properly to distribute the Notice of Election as required shall be grounds for setting aside the election. *See,* Rules and Regs. §102.62(e).

See evidence in support of Objection No. 2. Mr. Josh Prieto and other employee witnesses testified that they did not receive a copy of the Notice of Election via their company email. At hearing, management witnesses did not claim the Notices of Election were sent to bargaining-unit employees via their company email addresses—despite the Employer's "Company Email Address" policy. *See*, RX 62(a).

Failure to provide email addresses to the Union unfairly disadvantaged the Union in its ability to communicate with employees, particularly where any opportunity to communicate may have helped counter balance the Employer's overall conduct during the critical period. Taken in context with the Employers' other objectionable conduct as set forth herein, this violation warrants setting aside the election.

9. <u>Support for Objection No. 8</u>

The Employer interfered with laboratory conditions by changing employees' work reporting times and instructing them to report to the worksite early to board a charter bus or shuttle to the polling location.

Unlawful unilateral changes interfered with the election and, on their own, constitute sufficient basis to order a new election. *See e.g., Playskool Mfg. Co.*, 140 NLRB 1417, 1419 (1963); *Dal-Tex Optical Company, Inc.*, 137 NLRB 1782 (1962). The Board has recently reiterated this long-standing rule in other cases involving Sec. 8(a)(1) violations committed during the critical period. *See, e.g., Pac. Coast Sightseeing Tours & Charters, Inc.*, 2017 NLRB

LEXIS 115, *50 (2017)(citing *Super Thrift Markets, Inc*., 233 NLRB 409, 409 (1977)); *Taylor Motors, Inc*., 2017 NLRB LEXIS 66, *136 (2017)(citing *Arkema, Inc*., 357 NLRB 1248, 1250 (2011) and *Dal*-Tex, *supra,* 137 NLRB 1782).

GCX 71 is a copy of a text message sent by manager Tiffany DiStefano directing employees to report to the worksite outside of their normal reporting time in order to attend a "union busting meeting." Tr. 1896:7-1897:2. In addition, Prieto testified regarding CPX 3, bargaining-unit employee schedules for the week of the election, and pointed out where employee schedules were changed.

Taken in context with the Employers' other objectionable conduct as set forth herein, this violation warrants setting aside the election.

10. <u>Support for Objection No. 9</u>

The Employer's attempted polling of employees regarding their support for the Union, on its own, warrants setting aside the election.

It is unlawful for employers to distribute campaign paraphernalia in a manner pressuring employees to make an observable choice that demonstrates their support for or rejection of the union. *2 Sisters Food Group, Inc.*, 357 NLRB 1816, 1818 (2011), *quoting Circuit City Stores,* 324 NLRB 147 (1997). Under established Board precedent, there must be no other coercive conduct in connection with the distribution of antiunion paraphernalia. *Circuit City Stores, Inc*., *supra*, 324 NLRB at 147, *citing Barton Nelson, Inc*., 318 NLRB 712 (1995) and *Gonzales Packing Co*., 304 NLRB 805, 815 (1991). Employers are precluded from creating situations in which employees are forced to disclose their union sentiments. *Lott's Electric Co*., 293 NLRB 297, 303-304 (1989), enfd. mem. 891 F.2d 281 (3d Cir. 1989); *Miss. Chem. Corp*., 280 NLRB 413, 415 (1986); *Fimco, Inc*., 282 NLRB 653, 654 (1987); *Kona 60 Minute Photo*, 277 NLRB 867, 867 (1985).

Witness Bryce Perry testified that Kostew attempted to contact him the morning of the election to inquire into how Mr. Perry intended to vote in the election. Ms. Kostew admitted this reason was the basis for her attempt to contact Mr. Perry the morning of the election. CPX 6. Ms.

Kostew also contact Mr. Perry's mother in order to identify the way in which Mr. Perry planned to vote. CPX 8(a) – (c). This contact by Ms. Kostew occurred well within the critical period, and, in fact, within only a few hours of the election.

This constitutes a per se violation. Taken in context with the Employers' other objectionable conduct as set forth herein, this violation warrants setting aside the election.

11. <u>Support for Objection No. 10</u>

During the critical period, the Employer engaged in surveillance of union meetings resulting in destruction of the laboratory conditions of the election.

Multiple witnesses, including Bryce Perry, Alanzi Longstaff, Jasmine Glick, Laney Hill, Scott Tupy, Steven Urbanski and Josh Prieto, testified that they are aware that the Employer's theaters have hundreds of security cameras throughout the theaters, which also capture audio.[17] *See, e.g.*, Tr. 2267:5-25 (Urbanski). These witnesses testified that employees feared that David Saxe engaged in surveillance because he could watch them, and potentially even listen to their conversations at work, including those relating to protected concerted activities and unionization.

Management admitted the extent of the surveillance throughout the work areas in question. In support of its explanations at hearing for nearly each of the eleven individuals terminated, the Employer pointed to something it saw or looked at on surveillance video. The extent of the surveillance at the workplace provides sufficient evidence that the Employer was watching employees who spent time discussing the union while at work. Taken in context with the Employers' other objectionable conduct as set forth herein, this violation warrants setting aside the election.

[17] Bryce Petty described his personal knowledge that the surveillance cameras, or at least some of them, appeared to pick up audio because he observed movement on the screen in that he, as an audio technician, associates with sound waves. In addition, although he tried to downplay how much sound can be heard, General Counsel Ciulla admitted that some of the cameras pick up audio.

12. Support for Objection No. 11

During the critical period, the Employer, through upper management and its observer, Courtney Kostew, threatened employees with job loss and closure of the theater shows if the Union won the election.

Darnell Glenn testified that at a "union busting" meeting Employer representatives stated that if the Union were to win the election, the Employer would close the theater shows and employees would lose their jobs, including that they would lose their jobs and the shows would close if the Union won: "He gave an example of what happened to *Jubilee,* how they closed down because they unionized or something like that." Tr. 1899:18-25; 1900:2-11. This meeting took place in the critical period.

Kostew, the Employer's election observer stated: "I was all about it but I think I'm gonna tap out. Tommy [i.e., Estrada] said the other few times there have been union possibilities ***everyone involved was fired*** and I cannot afford to lose this job." GCX 58, emphasis added.

Kostew's statement further evidences that management threatened employees with termination if they engaged in union activity.

Taken in context with the Employers' other objectionable conduct as set forth herein, this violation warrants setting aside the election.

13. Support for Objection No. 12

During the critical period, the Employer disrupted the laboratory conditions by altering employees' work schedule to conduct six-hour captive audience meetings.

Unlawful unilateral changes interfered with the election and, on their own, constitute sufficient basis to order a new election. *See e.g., Playskool Mfg. Co.,* 140 NLRB 1417, 1419.

Darnell Glenn testified that his schedule was changed to attend a captive audience meeting. GCX 71 (reflecting schedule changes to attend a mandatory meeting on May 15, 2018). Prieto testified that he had to attend several hours of captive audience meetings. In addition, Prieto testified regarding CPX 3, bargaining-unit employee schedules for the week of the election, and pointed out where employee schedules were changed.

Taken in context with the Employers' other objectionable conduct as set forth herein, this violation warrants setting aside the election.

14. Support for Objection No. 13

During the critical period, the Employer disrupted the laboratory conditions by taking adverse actions against known union supporters that negatively impacted terms and conditions of employment. The evidence in support of this Objection largely overlaps with the General Counsel's closing brief in support of the consolidated unfair labor practice case.

Glenn testified that as of May 6, 2018, after union activity had started and in the week preceding the May 17 election date, the Employer reduced his regular schedule of approximately 22 or more hours per week down to 11 hours per week. Glenn testified that he was a known union supporter as he attended union-related meetings and because he is in a relationship with pro-union former employee, Jasmine Glick, who was discriminatorily discharged based on her union activity.

Glenn was told at one point that the reason the Employer provided for the reduction in hours is that "we wanted to give you a break," but that he was not in need of a break and had not requested a reduced work schedule.

Glenn works as an audio technician and Tupy is a lighting technician on the same show. On approximately June 1, 2018, Respondent decided to change the schedules of Glenn and Tupy to begin their show calls at 8:00 p.m., rather than 7:30 p.m. Prior to the change, Glenn and Tupy would begin setting up their equipment thirty minutes before the sound check, which occurs at 8:00 p.m. As a result of the scheduling change, Glenn and Tupy were to arrive at the same time as the sound check, making it impossible for them to prepare their equipment *before* sound check or the start of the show. Tr. 1758:-24-12; 1906:1-1908:25; GCX 72. Based on the impossible task of starting their tasks at the same time as sound check and to maintain the integrity of the show, Tupy continued to show up early to make sure his equipment was ready. On June 20, 2018, the Employer disciplined him for this, despite Tupy's explanation of why it was necessary for him to come in early, which prompted DeStefano to admit that the 8:00 p.m. start time was unworkable.

GCX 70; GCX 48; GCX 49. Going forward, DeStefano changed the start time to 7:45 p.m. Tr. 1908; GCX 49. Notably, the scheduling change happened shortly after Tupy strongly spoke out during Respondents' anti-union meetings on May 15, the same day that Saxe told Tupy and Glenn that he knew they supported the Union. This timing supports a finding that Employers were motivated by anti-union animus in changing the schedules of Tupy and Glenn in such a way that, admittedly, made their jobs impossible to perform. Moreover, the Employer failed to provide any explanation or defense for their decision to change the show call start time as they did. Indeed, no legitimate explanation exists.

After Urbanski observed the election on behalf of the Union, throughout late May, his supervisors began inquiring about when Urbanski would return to work from his injury to perform light duty. Urbanski informed the Human Resources Manager that he would be able to do so on June 4. However, from June 4 until June 21, when Urbanski was released to work full duty again by his medical provider, the Employer never offered him the opportunity to work light duty. Tr. 2281:6-2289:14; GCX 95. Then, Urbanski returned to work on July 8 as a lighting technician. However, his working conditions changed. Upon his return, he was instructed by DeStefano and Saxe to only perform tasks they personally assigned to him in writing. GCX 100 at 5. Over the course of the next few days, Urbanski reported to Saxe directly. Email records show that Saxe was spending an inordinate amount of time checking-in with Urbanski about every detail of his day. GCX 109; Tr. 2289:19-2319:8. Yet, before the election, Urbanski worked independently fixing equipment throughout theaters.

The Employers' targeting of Glenn, Tupy and Urbanski on account of their union activity constitutes a violation of Section 8(a)(3) of the Act and grounds to overturn the election.

15. <u>Support for Objection No. 14</u>

During the critical period, the Employer maintained an unlawful "Computer Use, E-Mail, Voice Mail, and the Internet" rule in its employee handbook. The unlawful handbook rule is another reason to warrant a new election. *Jurys Boston Hotel*, 356 NLRB 927 (2011).

GCX 99 is a copy of the employee handbook (for both V Theater and DSP) which contains several overly broad work rules restricting protected concerted activity, including but not limited to the rules restricting employee activity within the following handbook sections: Employee Relations, Conflict of Interest, Cell Phone Use, Acceptable Use of Computers, Email use, Social Media, and Non-Solicitation/Distribution. *See, HTH Corp*., 342 NLRB 372, 373 (2004)(discussing overly broad handbook rule regarding solicitation). The overly broad rules curtail employees' ability to communicate collectively regarding working terms and conditions. Further, the Employer's "Employee Relations" section states that employees should directly discuss concerns with compensation with supervisors, thus improperly implying that such concerns should not be discussed among co-workers. Further, the "Workplace Surveillance Policy" is overly broad and thus has the result of discouraging collective activity.

Individually and together, the above-referenced rules could reasonably be construed by employees as precluding them from communicating with each other about unionizing and their work terms and conditions. When sustaining objections relating to overly broad handbook rules, the Board has recognized that the workplace is "the one place where [employees] clearly share common interests and where they traditionally seek to persuade fellow workers in matters affecting their union organizational life and other matters related to their status as employees." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 574 (1978), *quoting Gale Products*, 142 NLRB 1246, 1249 (1963). In *HTH Corp*., 342 NLRB 372, 374 (2004), the Judge found that maintenance of an unlawful rule warranted setting aside the election and to support it, cited to *Freund Baking Co*., 336 NLRB 847 (2001)(directing a second election because of the maintenance of an employee handbook rule forbidding discussion of wages, hours, and other terms and conditions of employment). Even though there was no evidence in *Freund* that the rule was enforced, the Board found that the mere maintenance of the overbroad rule "reasonably tended to interfere with employees' free choice." *Freund, supra*, 336 NLRB 847. For these same reasons, the overly broad rules curtailing discussion of working terms and conditions among employees, alone, are

sufficient to warrant setting aside an election. *See, e.g*., *id*.; *Jurys Boston Hotel*, 356 NLRB 927, 928 (2011); *Eastex, Inc. v. NLRB*, *supra*, 437 U.S. at 574; *HTH Corp*., *supra*, 342 NLRB at 374.

C. CONCLUSION

The record here supports each and every one of the Union's Objections to the election. Any one of these Objections is sufficient to overturn the election results here. For these reasons, the Union urges that order for a new election be issued. In the alternative, should the ALJ determine the Employer committed unfair labor practice charges in the consolidated matter pursued by the General Counsel resulting in at least the reinstatement of a majority of the seven discriminatees who voted subject to challenge, then the Union requests the order with respect to its Objections be that the challenged ballots cast in the May 17, 2018 election by the reinstated discriminatees who voted subject to challenge be opened—rather than conduct a new election.

III. UNFAIR LABOR PRACTICE CASES

The Union joins in full in the General Counsel's closing brief, including its argument and request for remedies, for the companion unfair labor practices alleged in the Complaint, NLRB Cases 28-CA-219225, 28-CA-223339, 28-CA-223362, 28-CA-223376, and 28-CA-224119.

A. ARGUMENT

The Union provides further briefing in support of remedies sought by the General Counsel with respect to the companion unfair labor practices Complaint.

1. *Gissel* Remedy Warranted for the Warehouse Unit

a. Guiding Principles Support the *Gissel* Order Sought by the General Counsel

Congress granted the Board with the authority to remedy unfair labor practices under Section 10(c) "to take such affirmative action… as will effectuate the policies of this Act." *Gourmet Foods*, 270 NLRB 578, 584 (1984). That authority is undeniably "broad" and is "subject to limited judicial review." *Id*. The authority has been recognized as limited when its exercise would "violate a fundamental premise on which the Act is based." *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970). A *Gissel* order is a bargaining order issued when a fair re-run

election is not possible given the serious nature of an employer's unfair labor practices because the employer's pervasive practices have the tendency to undermine majority strength and impede the election processes. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 614. For the reasons set forth below, the remedy the General Counsel seeks for a *Gissel* bargaining order covering a unit of warehouse technicians is proper under the guiding principles of Board law.

On April 26, 2018, the Union filed a RC petition in Case No. 28-RC-219130 seeking to represent a unit of stage technicians, audio technicians, lighting technicians and warehouse technicians at DSP and V Theater Group LLC. In the Employers' Statement of Position, the Employer took the position that warehouse technicians should be excluded from the unit. [18] Following the election that took place on May 17, 2018, the Union and the Employers both filed objections to the conduct of the election and position statements on the seven challenged ballots. The General Counsel issued a Complaint on July 9, 2018 and a Consolidated Complaint on August 20, 2018 based on various unfair labor practice charges the Union filed alleging various 8(a)(1) and 8(a)(3) violations. One of the remedies sought in by the General Counsel includes a *Gissel* bargaining order for a unit of warehouse technicians.[19]

It is well settled that there is more than one way in which employees may appropriately be grouped for purposes of collective bargaining. *See, e.g.*, *General Instrument Corp. v. NLRB*, 319 F.2d 420, 422–423 (4th Cir. 1963), cert. denied 375 U.S. 966 (1964); and *Mountain States Telephone Co. v. NLRB*, 310 F.2d 478, 480 (10th Cir. 1962). Under these Board precepts, a *Gissel* order similarly may cover *an* appropriate unit wherein the Union had a card majority. The Employer's unfair labor practices have tainted the ability to hold a fair election for *any* appropriate unit. The *Gissel* remedy sought by the General Counsel parallels the unit the Union

[18] The parties attended a hearing in the RC case wherein the parties took some testimony from DSP owner David Saxe relating to the Employers' proposed exclusion of warehouse technicians from the unit. The Union entered into a stipulated election agreement providing for a unit of stage technicians, audio technicians, lighting technicians and wardrobe technicians out of a compromise to move forward with an election without awaiting a Decision and Direction of Election. The Regional Director approved the stipulated election agreement on May 9, 2018.

[19] The Union joins in the General Counsel's post-hearing briefing on the *Gissel* remedy sought on behalf of the warehouse technician unit.

sought in its RC petition as it sought to represent warehouse technicians, along with stagehands, lighting technicians, audio technicians. A *Gissel* order for the warehouse unit is in line with Board principles that allow a union to petition for an appropriate collective bargaining unit, and significantly, doing so will effectuate the policies of the Act given the nature and extent of the violations at issue here. *See, Gourmet Foods, supra*, at 584; *see also, Regional Home Care, Inc.*, 329 NLRB 85 (1999); *see also, Hilton Hotels Corp.*, 282 NLRB 819 (1987)(the Board did not limit the *Gissel* order remedy to only a unit in which the union had filed the RC petition, nor did it limit *Gissel* orders to only a unit in which a previous election was conducted).

The fundamental purpose of a *Gissel* order recognizes that a fair, re-run election is not feasible. Evidence at hearing showed that David Saxe's unfair labor practices were pervasive and thus, a fair, re-run election of the warehouse technicians is not feasible. The Employer failed to come forward with any evidence to show that the *Gissel* remedy sought by the General Counsel would violate a fundamental premise on which the Act is based. *H.K. Porter Co., supra*, 397 U.S. at 108. There is broad authority for the ordering of a *Gissel* bargaining order, and the evidence of a concerted pattern of violations persuasively supports it.

2. <u>Heightened Remedies Warranted</u>

The Union joins the General Counsel's pursuit of reinstatement, a *Gissel* bargaining order on behalf of the warehouse unit and all other specific relief measures sought to remedy the unfair labor practices, including an electronic posting and physical posting at DSP's facility and V's facility of a Notice and an Explanation of Rights; a Notice reading by Saxe during work time before the widest audience possible, a Board agent and Union representative; an order requiring that the named discriminatee employees be made whole, including, but not limited to, reinstatement, payment for consequential economic harm the employees incurred as a result of Respondents' unlawful conduct and all other relief as may be just and proper to remedy the unfair labor practices alleged.[20]

[20] In addition to a re-run election, such remedies, by extension, will also remedy the objections filed by the Union to the extent the General Counsel covered the same misconduct in the Complaint.

The General Counsel's request to have the notice read aloud by David Saxe before the widest audience possible, including bargaining-unit employees and supervisors, is accomplished by holding an all-hands production crew meeting immediately prior to the start of regular show preparation. David Saxe testified to holding such all-hands meetings at one of the showrooms of the V Theaters in the past. The Board has required that notices be read aloud by high-ranking officials or Board agents when numerous serious unfair labor practices have been committed by high-ranking management officials. *See, e.g.*, *Allied Med. Transp., Inc.*, 2014 NLRB LEXIS 528, *20 (2014)(fn. 9 (2014); *Federated Logistics & Operations*, 340 NLRB 255, 258 (2003), affd. 400 F.3d 920, 929–930 (D.C. Cir. 2005)(when unfair labor practices are severe and widespread, having the notice read aloud to employees allows them to "fully perceive that the Respondents and its managers are bound by the requirements of the Act."); *see also*, *Homer D. Bronson Co*., 349 NLRB 512, 515 (2007); *Excel Case Ready & United Food & Commer. Workers Union*, 334 NLRB 4, 5 (2001)(finding that the reading of the notice "will ensure that the important information set forth in the notice is disseminated to all employees, including those who do not consult the Respondent's bulletin boards."). The severity and breadth of the violations show this remedy is required to allow harmed employees to exercise their Section 7 rights free from coercion.

The General Counsel has sought reinstatement and compensatory relief for all of the discharged discriminatees. The reinstatement of the eleven discriminatees' employment is necessary to protect their livelihoods and significantly, to avoid chilling all other employees' willingness to engage in protected union activities. *See*, *Silverman v. Whittall & Shon, Inc.*, 1986 WL 15735, at *1 (S.D.N.Y. 1986) (once a union leader is fired, "no other worker in his right mind would participate in a union campaign."). Reinstatement of the discharged employees will assure employees they have a remedy if their employer were to try to fire them for union activity. It will make clear to them such discriminatory discharges are unlawful and will not be tolerated. Showing the remaining production crew that they have recourse, and that their former co-workers were made whole, will also boost morale and increase employees' sentiment that they

can engage in union activity because David Saxe will face consequences if he fires them for doing so.

In addition to those remedies sought by the General Counsel, the Union seeks the following additional remedies, of particular import if a re-run election is conducted, to not only remedy the violations but also to act as safeguards in that re-run election. First, the Employer should be ordered to remove all security cameras, including those with audio recording capabilities from work areas, including break rooms and backstage areas, in order to eliminate the impression of surveillance through those means. To that end, the Employer should be ordered to cease and desist from creating the impression amongst employees that it was engaging in surveillance of their union or other protected concerted activities. *See, Allied Med. Transp., Inc.,* 2014 NLRB LEXIS 528, *86 (2014).

Next, a live, videotaped notice reading by David Saxe in front of all current and terminated employees and management, that is subsequently posted on YouTube, should be ordered based on the this employer's egregious, pervasive unfair labor practices and objectionable conduct. *See, e.g., Allied Med. Transp., Inc.*, 2014 NLRB LEXIS 528, *20 (2014)(finding a "public reading of the notice is appropriate in light of the Respondent's numerous serious unfair labor practices, which were committed by a high-ranking management official…Reading the notice serves as a minimal acknowledgement of the obligations that have been imposed by law and provides employees with some assurance that their rights under the Act will be respected in the future.")(citing *Homer D. Bronson Co*., 349 NLRB 512, 515-516 (2007), enfd. mem. 273 Fed. Appx. 32 (2d Cir. 2008)); *see also*, *Consec Security*, 325 NLRB 453, 454-455 (1998), enfd. 185 F.3d 862 (3d Cir. 1999) (participation of high-ranking management in ULPs magnifies the coercive effect); *Mcallister Towing & Transportation Co.,* 341 NLRB 394, 400 (2004) ("[T]he public reading of the notice is an 'effective but moderate way to let in a warming wind of information and . . . reassurance. [citations omitted].'"); *Allied Med. Transp., Inc*., 2014 NLRB LEXIS 528, *85 (2014). Given the current state of technology, it is widely-known that social media is an effective means of disseminating information, as evidenced by the

discriminatees' use of Facebook chat to plan union meetings and discuss unionization. A posting of the Notice reading on YouTube will assure that all members of the production crew are able to view the reading. The format will also facilitate understanding as it provides listeners the opportunity to pause, re-wind and re-listen to certain portions of the reading. Similarly, for these same reasons, a longer notice posting period of 120 days should be ordered. *See, e.g., Allied Med. Transp., Inc.*, 2014 NLRB LEXIS 528, *20 (2014).

Next, there should be an order specifying that the Union should be permitted to pick the election date if a re-run election is ordered. The timing of the election date is crucial to assuring an efficient election free from the employer intimidation faced in early 2018.

Further, if a re-run election is ordered, the Union should be given full access to the Employer work site, including use of bulletin boards and work email, in the critical period leading up to a re-run election to ameliorate and compensate for the harm the Employer's objectionable conduct and unfair labor practices caused. Along the same lines, given the scope of the Employer's objectionable conduct, the Employer should be prohibited from campaigning prior to the election. The Employer's pervasive unfair labor practices and objectionable conduct at issue at the hearing on the consolidated matters provided the Employer with ample opportunity to campaign above beyond the bounds permitted. The evidence at hearing showed that the Employer has not shown itself capable of campaigning in a manner that comports with the Board's policies for fair elections free from intimidation, and thus, it should be prohibited from campaigning at all.

Last, a broad cease and desist order should be ordered stating that the Employer shall cease from engaging in all unfair labor practices alleged in the Complaint and from all objectionable conduct alleged in the Union's objections. *See, Hickmott Foods*, 242 NLRB 1357 (1979)(finding a broad cease-and-desist order is warranted because the Respondent "has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights."); *Allied Med. Transp., Inc.*, 2014 NLRB LEXIS 528, *20 (2014)(recognizing a broad cease and desist order as appropriate given when the employer

committed multiple separate violations of Sec. 8(a)(1))). In this case, the Respondents committed multiple separate violations of Sec. 8(a)(1) and Sec. 8(a)(3) during a union organizing campaign, and terminated eleven known union supporters for their union activity in the several weeks following the Respondents' knowledge of the union organizing campaign and within the two months preceding the union election, therefore a broad cease and desist order is appropriate. (*Id.*)

B. CONCLUSION

For the above reasons articulated herein, and those cited by the General Counsel in which the Union joins, all remedies sought by the General Counsel and the additional remedies sought by the Union, should be granted. By granting these remedies, employees will be given a fair chance and the ability to act collectively for the betterment of their working conditions. Doing so lifts up not only their individual wages, benefits and working terms, but also the standards for equivalent positions in the area.

Dated: January 8, 2019

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

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CERTIFICATE OF SERVICE

I am a citizen of the United States and resident of the State of California. I am employed in the County of Alameda, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years and not a party to the within action.

On January 8, 2019, I served the following documents in the manner described below:

UNION'S POST-HEARING BRIEF IN SUPPORT OF OBJECTIONS TO ELECTION, UNION'S POSITION ON CHALLENGED BALLOTS AND IN SUPPORT OF UNFAIR LABOR PRACTICE CHARGES

☑ (BY ELECTRONIC SERVICE) By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system from lhull@unioncounsel.net to the email addresses set forth below.

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on January 8, 2019, at Los Angeles, California.

/s/ Katrina Shaw
Katrina Shaw